Supreme Court, U. S.
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UNITED STATES SUPREME COURT

NUMBER 78-541

DELTA REFRIGERATION COMPANY, INC.

PETITIONER

AGAINST

THE UPJOHN COMPANY

RESPONDENT

APPLICATION FOR WRITS
ON BEHALF OF DELTA
REFRIGERATION COMPANY, INC.

SUBMITTED BY:

BAKER, CULPEPPER & BRUNSON
ATTORNEYS AT LAW
P. O. DRAWER E
JONESBORO, LOUISIANA 71251
ATTORNEYS FOR PETITIONER

BOBBY L. CULPEPPER

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1978

NO. _____

DELTA REFRIGERATION COMPANY, INC.
Petitioner,

-against-

THE UPJOHN COMPANY
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Delta Refrigeration Company, Inc. respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above case on July 5, 1978.

OPINIONS BELOW

The original opinion of the United States District Court for the Western

District of Louisiana was rendered under Docket Number 750136, with Reasons for Judgment being rendered and filed on May 25th, 1977 and judgment being rendered and filed on June 7th, 1977, copies of which Reasons and Judgment are attached hereto and made a part hereof and are appended to this petition in the Appendix at page numbers 1A, et seq. The original judgment of the United States Court of Appeals for the Fifth Circuit is an unreported case, bearing docket number 77-2634, summary calendar, a copy is attached hereto and appended to this petition in the Appendix, page 21A.

JURISDICTION

The Judgment of the Court of Appeals for the Fifth Circuit was rendered on June 13th, 1978, issued on July 5th, 1978 and filed on July 7th, 1978. This Courts jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

The Honorable District Court held that there was a breach of contract, but that damages were not proven. Counsel would refer Your Honors to the Reasons for Judgment, annexed hereto as part of the Appendix. The primary issue involved concerns the decision of the District Court in regard to damages. It is urged that a review of the evidence clearly shows the damages sustained by petitioner. While they do not present themselves to a specific amount, they do indicate substantial compensable losses. It is urged that a close reading of the District Court's decision points out the damages sufficiently to justify an award of the losses as alleged, shown and proven.

Secondly, it is urged that the Honorable District Court erred in refusing to grant the Application for New Trial and/or Rehearing where new evidence developing

since the closing of the trial, particularly where additional losses caused by a "foreclosing" developed.

STATUTORY PROVISIONS

The instant case involves no federal statutes, rules or regulations.

No specific Louisiana statutes are involved in regard to the quantum of damage recoverable, or the proof required therefor; the Louisiana jurisprudence clearly setting forth the requirements.

STATEMENT OF THE CASE

This is a diversity action wherein Delta Refrigeration Company, hereafter called Delta, claimed monetary damages from The Upjohn Company, hereafter called Upjohn, for materially misrepresenting facts concerning a polyurethane spray foam which Upjohn sold to Delta. Defendant counter-claimed for the outstanding balance on an account plaintiff had with Upjohn.

Delta was incorporated in 1972. Several persons who later on worked for plaintiff, had observed polyurethane being sprayed to insulate buildings. They attended a week long class in North Haven, Connecticut, which Upjohn prepared and presented for those learning the polyurethane business. After attending the school, reviewing literature concerning the foam, and experimenting with small amounts of polyurethane, Delta officers and employees began expanding their business. They purchased large quantities of the chemicals used in making the foam from Upjohn, and completed jobs for several customers in late 1972 and early 1973.

In 1973 the Federal Trade Commission began investigating complaints concerning burning characteristics of polyurethane. News media reports and a special documentary report shown on national television brought this matter to public

attention by showing that polyurethane was not as safe a building material as had been advertised. The controversy practically speaking caused plaintiff's business to decrease drastically. Some smaller insulating projects were undertaken, but its business became unprofitable because it could not find enough customers who felt the product was safe and economical.

Defendant supplied the necessary chemicals to produce CPR 425, a polyurethane foam used by plaintiff to insulate buildings for customers. Defendant also published burn-retardency factors, flame and heat resistance figures, eacy application and other characteristics concerning foam which supposedly made polyurethane self-extinguishing and safe. Delta officers and employees testified that they would not have purchased defendant's polyurethane if they had known that the foam needed a protective coating or a sprinkling system to install

it safely because these precautions significantly increased insulation costs of building.

The Honorable District Court found that Upjohn misrepresented its product, though not with fraudulent intent, thereby breaching its contractual representations, made to plaintiff through its advertising and sales literature, and upon which plaintiff was entitled to rely when purchasing CPR 425. The Honorable District Court found that Delta relied upon Upjohn's representation that CPR 425 was a safe insulant. The Court further found that had Delta known that a protective coating or a sprinkler system was needed to help prevent fire damage to the material and to the buildings in which it was applied, Delta probably would not have bought polyurethane because other urethane insulant would have been more economical.

However, the Honorable District Court found that Delta failed to prove by a preponderance of the evidence that it was damaged and therefore refused to award any damages.

Federal jurisdiction in the Court of the first instance was based upon the provisions of 28 U.S.C. 1332, the Constitution and the laws of the United States, the parties being citizens of different states and the amount in controversy being in excess of $10,000.00.

SUMMARY OF THE ARGUMENT

Delta did suffer damages as the result of defendant's breach of an expressed warranty. Plaintiff did borrow $60,000.00 from the SBA and claimed this as damages plus $10,400.00 interest. The SBA application was introduced into evidence as plaintiff's Exhibit "1", along with the note and the SBA mortgage. If this exhibit does not contain the entire doings

with the SBA, plaintiff should now be allowed to supplement said offering. Furthermore, the SBA has now foreclosed in this matter and has obtained a judgment against plaintiff and the matter should, at least, be re-opened for the purpose of going into this, which happened after the original trial herein. As pointed out by the testimony in this matter, much of the equipment purchased can only be used in the polyurethane business, and thus is of no value to plaintiff.

Plaintiff submits that they should have been awarded damages in the amount of $20,000.00 for "supplies on hand". Representatives of plaintiff testified that they had supplies on hand which would not be utilized. Plaintiff could not dispose of these items, or of any of the equipment in this matter, unless to someone who was in the polyurethane business. Plaintiff was not able to find such a purchaser, and, as to the property mortgaged to the SBA,

could not do this without the permission of the SBA.

Plaintiff proved damages in the amount of $20,000.00 for initial cash invested in the business. Mr. Ward and Mr. Mitchell testified as to their initial investment in order to get the corporation going and as to the cost of attending the Upjohn school. Certainly, this should be awarded as an item of damages.

Plaintiff should have been awarded $100,000.00 for value of time, etc. invested in the business, and an additional $100,000.00 for damage to the business reputation. Mr. Ward and Mr. Mitchell testified as to the tremendous amount of hours that they had put into the business in order to get it going, and to the fact that they had not made any profits on a number of original jobs in order to build up the reputation of the business.

Plaintiff's corporation apparently had a good reputation in the refrigeration business, prior to the episode with polyurethane. Also, the evidence shows that Delta Refrigeration would have continued to do work for Green Buildings on a large scale volume had the product been what it was represented to be by the Upjohn representative. Certainly, plaintiff is entitled to recover this.

It is respectfully submitted that plaintiff should have been awarded $100,000.00 for damages for breach of contract. The Honorable District Court correctly found that there was a breach of an expressed warranty. Plaintiff would submit that the evidence produced at the trial of this matter certainly shows that plaintiff corporation was severely damaged because of a breach of this contract, and is entitled to general damages for breach of contract.

The application for new trial and/or rehearing dated July 1, 1977 should have been granted in this matter. For the reasons discussed in argument number 1, plaintiff should have been granted its application for new trial and/or rehearing.

ARGUMENT AND LAW IN SUPPORT OF ALLOWANCE OF WRIT

I. DELTA DID PROVE BY A PREPONDERANCE OF THE EVIDENCE THAT IT SUFFERED DAMAGES UNDER THE FACTS OF THIS CASE.

Counsel for plaintiff would refer Your Honors to page 128 through 129 in the Appendix wherein it was stipulated that a loan in the amount of $60,000.00 was made through the SBA to enable plaintiff to enter the polyurethane business. Further, plaintiff's Exhibit "1" was a copy of the application for the SBA loan. In regard to the damages in the amount of $20,000.00 for"supplies on hand", representatives of plaintiff testified that they had supplies

on hand which could not be utilized. Plaintiff could not dispose of these items or of any of the equipment in this matter, unless to someone who was in the polyurethane business. Plaintiff was not able to find such a purchaser, and, as to the property mortgaged to the SBA, could not do this without the permission of the SBA.

As to the $20,000.00 for initial cash invested in the business, Mr. Ward and Mr. Mitchell testified as to their initial investment in order to get the corporation going, and as to the cost of attending the Upjohn school. Certainly, this should be awarded as an item of damages.

In regard to the $100,000.00 plaintiff claimed for value of time, etc. invested in the business and an additional $100,000.00 for damage to the business reputation, Mr. Ward and Mr. Mitchell testified as to the tremendous amount of

hours that they had put into the business in order to get it going, and to the fact that they had not made any profit on a number of original jobs in order to build up the reputation of the business. Also, the evidence shows that Delta Refrigeration would have continued to do work for Green Buildings on a large scale volume had the product been what it was represented to be by the Upjohn representative. Certainly, plaintiff is entitled to recover this.

In regard to the $100,000.00 for damages for breach of contract, counsel for plaintiff would respectfully submit that evidence at the trial of this matter certainly shows that plaintiff corporation was severely damaged because of the breach of this contract and is entitled to general damages for breach of contract.

In further support of these contentions, counsel for plaintiff would respectfully refer Your Honors to the following pages in the Appendix which

specifically revealed testimony and/or other evidence which would go to prove damages. These are as follows:

Pages 58 through 60, page 63, page 118, page 128 through 130, page 134, page 136, pages 138 through 139, page 141, pages 142 through 143, page 145 through page 146, page 148, page 180 through 183, page 237 (wherein John A. Mitchell, Sr. testified that his testimony would be essentially the same as Mr. Wards, who had previously testified and whose evidence has been included in the prior numbers cited), page 246, page 249 through 250, page 251 through 253, page 398 through 399 and page 438 through 439.

It is true that plaintiff must prove with legal certainty every item of damages claimed. Culpepper vs. Natchitoches Parish School Board (La. App. 1976) 333 So. 2d 453, Writ Denied 338 So. 2d 287. However, it is well settled in Louisiana that realistically, in quantum issues, as in other issues, there must necessarily be a degree of uncertainty in predicting the ultimate result in the given case. Coco vs. Winston Industries, Inc., 341 So. 2d 332. Also, it is clear that damages cannot be fixed with preciseness and are within the discretion of the Trial Judge. Thompson vs. Russo, 328 So. 2d 683.

Of course, it is plaintiff's contention that damages were proved by a preponderance of the evidence. However, in any case it has been held that where damages are obviously due, such as in the case at hand, but the record is deficient in some respects, the Courts have

authority to award some reasonable amount as to damages. Henry Waters Truck & Tractor Company, Inc. vs. Relan, 270 So.2d 463, Writ Denied, 279 So.2d 206 (La. App., 1973).

Louisiana jurisprudence is replete with instances wherein the Court have held that when it is clear that a party has sustained some damages as the result of another's fault, such demands by the party will not be rejected merely because he cannot establish exactly the amount suffered; under such circumstances, the Trial Court must fix quantum as best it can. Peoples Moss Gin Company, Inc. vs. Jenkins, (La. App. 1972), 270 So.2d 285. More specifically, the Courts have held that where there is a legal right to recovery, but damages cannot be exactly estimated, Courts have reasonable discretion to assess the same based on all the facts and circumstances of the case.

Jordan vs. Travelers Insurance Company, (La. 1971) 245 So.2d 151, Fahuque Realty Company vs. Employers Commercial Union Insurance Company of America, 327 So. 2d 563, Cert. Denied 330 So. 2d 617, Writ Denied 331 So. 2d 496 (La. App. 1976), Brouillette vs. National Remodelers and Rebuilders, Inc., 321 So. 2d 525 (La. App. 1975).

The Honorable Trial Court in this case found that there had been a breach of contract based upon breach of warranty. It has been held in Louisiana that plaintiff's demands for damages for breach of contract would not be rejected merely because he cannot establish exactly the amount in which he is damaged. Under such circumstances, it has been held that the Court must fix quantum as best it can. North American Contracting Company vs. Gibson, 327 So. 2d 444, Writ Refused 332 So. 2d 280, (La. App. 1975).

In regard to the definition of what constitutes "legal certainty", the Louisiana Appellate Court in Jolley Elevator Company vs. Schwegmann Brothers Giant Supermarket, 230 So.2d 640 (La. App. 1970), the Court found that what constitutes "legal certainty" becomes a matter for a decision in each individual case as it arises. The amount of the damages for the breach of contract must be determined in relation to that contract and circumstances which surround it.

Counsel for plaintiff would submit that damages were proven by a preponderance of the evidence in this case and that it is entitled to recovery.

II. PLAINTIFF SHOULD HAVE BEEN GRANTED ITS APPLICATION FOR NEW TRIAL AND/OR REHEARING DATED JULY 1, 1977.

This application for new trial and/or rehearing was based upon the facts

elicited through testimony and other evidence entered into the record as discussed in argument number 1. Counsel for plaintiff would respectfully submit that Delta was clearly entitled to a new trial and/or rehearing.

C O N C L U S I O N

For the reasons set forth above, it is respectfully submitted that a Writ of Certiorari should issue to review the judgment of the United States Court of Appeals for the Fifth Circuit.

BAKER, CULPEPPER & BRUNSON
ATTORNEYS AT LAW
P. O. DRAWER E
JONESBORO, LOUISIANA 71251

BY: _____
BOBBY L. CULPEPPER

C E R T I F I C A T E

I hereby certify that a copy of the foregoing Application for Writs has been served upon THE UPJOHN COMPANY by mailing a copy of same, in the United States mail, postage prepaid, addressed to Mr. Mark C. Surprenant, Adams and Reese, 4500 One Shell Square, New Orleans, Louisiana 70139 and Mr. R. L. Davis, Jr., Theus, Grisham, Davis & Leigh, Attorneys at Law, P. O. Drawer 4768, Monroe, Louisiana 71203.

Jonesboro, Louisiana this the _____day of _____, 1978.

BOBBY L. CULPEPPER

APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR

THE WESTERN DISTRICT OF LOUISIANA

MONROE DIVISION

CIVIL ACTION
No. 750136

DELTA REFRIGERATION COMPANY, INC.

versus

THE UPJOHN COMPANY

FOR PLAINTIFF	MESSRS. Bobby L. Culpepper Baker, Culpepper & Brunson Post Office Box E Jonesboro, Louisiana 71251
FOR DEFENDANT	Ronald Lee Davis, Jr. Theus, Grisham, Davis & Leigh Post Office Box 4768 Monroe, Louisiana 71201

BEN C. DAWKINS, JR., SENIOR JUDGE

RULING ON THE MERITS

In this diversity action, Delta Refrigeration Company (Delta) claims monetary damages from the Upjohn Company (Upjohn) for materially misrepresenting facts concerning a polyurethane spray foam which the latter sold to the former. Defendant counter-claims for the outstanding balance on an account plaintiff has with Upjohn. Our jurisdiction rests upon 28 U. S. C. § 1332, and venue is proper.

L I A B I L I T Y

Delta was incorporated in 1972. Several persons, who later owned and worked for plaintiff, had observed polyurethane being sprayed to insulate buildings. They decided to attend a week-long class in North Haven, Connecticut, which Upjohn prepared and presented for those learning the polyurethane business.

After attending that school, reviewing literature concerning the foam, and experimenting with small amounts of polyurethane, Delta officials began expanding their business. They purchased large quantities of the chemicals used in making the foam from Upjohn, and completed jobs for several customers in late 1972 and early 1973.

A combination of events in 1973 caused a shadow to fall over the polyurethane business nationwide. The Federal Trade Commission (FTC) began investigating complaints concerning burning characteristics of polyurethane. News media reports, and a special documentary report on national television, heightened public attention by showing that polyurethane was not as safe a building material as had been advertised.

The controversy surrounding polyurethane products caused plaintiff's business to grind to a screeching halt. Some smaller insulating projects were undertaken, but,

by and large, its business became unprofitable becuase it could not find enough customers who felt the product was safe and economical.

Defendant supplied the necessary chemicals to produce CPR 425, a polyurethane foam used by plaintiff to insulate buildings for customers. In numerous trade journals, advertisements, and even at the North Haven training school, Upjohn represented its polyurethane as being self-extinguishing and safe. See, for example, plaintiff's Exhibits Nos. 8, 14, 31, and 35, attached and made a part of this opinion. It published burn-retardency factors, flame and heat resistance figures, easy application, and other characteristics concerning foam which supposedly made polyurethane a builder's gold mine and a fire marshal's dream.

Delta relied upon Upjohn's representations that CPR 425 was a safe and potentially profitable building material. It could not afford to test each material it bought,

so it relied upon the reputation and representations made by Upjohn. Delta officials testified that they would not have purchased defendant's polyurethane if they had known that the foam needed a protective coating or a sprinkler system to install it safely because these precautions significantly increased insulation costs of buildings.

Plaintiff seeks enhanced damages based on its claim that Upjohn deliberately misrepresented the chemicals in bad faith, and thus defrauded Delta. We find no evidence of fraud or bad faith upon Upjohn's part. Consequently, the more remote damage, e. g., loss of plaintiff's business reputation, has not been proven. La. R. C. C., Art. 1934.

Since plaintiff here seeks attorney fees, defendant argues that plaintiff filed its complaint untimely. 1/ Defendant contends

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1/ "The redhibitory action must be instituted within a year, at the farthest, commencing from the date of the sale.

/Footnote continued next page/

that Delta is claiming damages for a redhibitory vice or defect[2/] inasmuch as attorney fees are recoverable in such actions. La. R. C. C., Art. 2545. *Palmer vs. Anchor Marine, Inc., et al*, 331 So. 2d 114 (La. App. 1st Cir., 1976). But, these may not be awarded where the claims are based upon an express warranty of quality. *Morein v. G. J. Deville Lumber Company*, 215 So. 2d 208 (La. App. 3rd Cir., 1968).

As the Civil Code Article explains, redhibitory defects are hidden vices of which buyers are unaware when they purchase products or things. Here, Upjohn represented that its

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/Footnote 1 - Continued:/

"Nor where the seller, not being domiciliated in the State, shall have absented himself before the expiration of the year following the sale; in which case the prescription remains suspended during his absence." La. R. C. C., Art. 2534.

2/ "*Redhibition* is the avoidance of a sale on account of some vice or defect in the thing sold, which renders it either absolutely useless, or its use so inconvenient and imperfect, that it must be supposed that the buyer would not have purchased it, had he known of the vice." La. R. C. C., Art. 2520.

CPR 425 was flame-retardent and self-extinguishing, claims which the facts of this case show are not so, and were held by FTC to be misleading and unfair:

> "PARAGRAPH SIXTEEN: In truth and in fact:
>
> "(a) The aforesaid ASTM test standards are neither reliable nor accurate tests for determining, evaluating, predicting or describing the burning characteristics of Plastics Products under actual fire conditions.
>
> "(b) The aforesaid descriptive terminology and expressions, including 'non-burning', 'self-extinguishing', '25 flame spread', and the like, neither reliably nor accurately describe the burning characteristics of Plastics Products under actual fire conditions." *In the Matter of: Society of the Plastics Industry, Inc., et al, before the Federal Trade Commission*, Docket No. C-2596, November 4, 1974. (Plaintiff's Exhibit No. 6, page 11.)

The thrust of plaintiff's claim is to recover, not for a hidden defect, a redhibitory vice; instead, it is to be awarded damages for breach of the express warranties

Upjohn made when it sold the chemicals. Therefore, the proper prescriptive period (Statute of Limitations) is found in La. R. C. C., Art. 3544--ten years--not the one-year period provided by Art. 2534.

Defendant similarly argues that plaintiff's claim is in the nature of a *delict*, or tort, and a one-year peremptive period for filing claims should apply. La. R. C. C., Art. 3536.

We find, however, that Upjohn misrepresented its product, though not with fraudulent intent. Hence, it breached its contractual representations, made to plaintiff through its advertising and sales literarute, and upon which plaintiff was entitled to rely when purchasing CPR 425.

Defendant claims that there was no restrictive buying or selling agreement confected between Upjohn and Delta, consequently, there was no contractual relationship between them. Although plaintiff and defendant were

not parties to a written agreement or guarantee that CPR 425 was self-extinguishing, Upjohn advertised and sold it as having characteristics which it did not have, and failed to advise Delta, as a purchaser, of its flammable qualities. Therefore, plaintiff properly seeks recovery for breach of contract.

Defendant contends that Delta officials made the decision to purchase polyurethane independently of Upjohn's advertisements, literature, and the knowledge of the product they acquired in North Haven. The evidence does not support that contention at all.

Delta's owners were intrigued with the foam after first seeing it being applied, but they only dabbled with it until they read the Upjohn literature, attended the school in Connecticut, and were led to believe that CPR 425 could be used economically for insulation in their construction business. In short, Delta relied upon Upjohn's representation that CPR 425 was a safe insulant.

Had it known that a protective coating or a sprinkler system was needed to help prevent fire damage to the material and to the buildings in which it was applied, Delta probably would not have bought polyurethane because other urethane insulants would have been more economical.

Upjohn further argues that plaintiff's damage was caused by poor internal management, rather than misrepresentations concerning its product. Delta's business was increasing steadily until the adverse publicity concerning polyurethane was aired. Suddenly, public officials and others managing large buildings lost interest in the product and would not consider using it for insulation. As interest faded, Delta's business rapidly declined.

Defendant attempts to excuse its misrepresentations by asserting a "then state of the art" defense. It claims that all companies which produced a polyurethane

chemicals were advertising their products as "non-burning" and "self-extinguishing." The simple fact is that Upjohn misrepresented CPR 425, and plaintiff relied on its claims to its detriment. We will not honor a defense of universal ignorance in promoting polyurethane to defeat plaintiff's claim.

Q U A N T U M

After Delta was incorporated in 1972, it borrowed $60,000.00 from the Small Business Administration (SBA). The loan was confected so that Delta could purchase equipment, materials, and supplies which it needed in order to enter into the polyurethane business. Defendant stipulated that the loan was made to Delta. In its complaint, plaintiff seeks recovery of the full $60,000, plus $10,400, representing interest on the loan.

Plaintiff introduced into evidence a list of machinery and supplies which it bought for use in its polyurethane operation.

Plaintiff's Exhibit No. 3. On the list, plaintiff showed the cost of "fair market value" of the items and their book value (we assume the items were depreciated for tax purposes).

Plaintiff claims that it is entitled to recover the full amount of the loan, plus interest. Delta has not proven the amount, or even the rate, of interest which it seeks; therefore, we cannot award it as an element of damage. Plaintiff's list of machinery and equipment totals approximately $46,500. Even if plaintiff spent that much on machinery it has not been shown how it disposed of the remaining $13,500. The testimony indicated that some of the equipment, including two trucks, had been sold. There was no proof as to the amounts these sales produced. The record contains no evidence of concerted effort by the plaintiff to sel the left-over equipment although some of it should have been readily marketable.

Plaintiff seeks $20,000.00 for "supplies on hand," in addition to the $60,000 for the SBA loan and $10,400 for interest on the loan. We cannot conclude from the evidence in the record that plaintiff is entitled to any of these elements of damage. The amount of interest has not been proven, the full disposition of the $60,000 has not been shown, and even with respect to the listed purchases, no *bona fide* effort has been made by plaintiff to dispose of them for their fair market value.

Plaintiff seeks $20,000 for "initial cash invested in the business". Several Delta personnel attended the North Haven polyurethane training course, but their expenses have not been shown with any degree of accuracy. Several witnesses testified concerning the approximate cost of the course, but we cannot award damages merely on pure speculation or conjecture. The facts simply do not show the true cost of the course to Delta,

and it did not prove additional, initial investments or expenses; consequently, it is not entitled to an award for this item.

Delta lists as elements of damage "value of time, etc. invested in the business -- $100,000 and damage to business repretation [sic] -- $100,000." Proof of these two elements of damage is totally absent from the record. Delta employees worked on various jobs, and Exhibit Ward No. 1 shows labor costs on the projects, but the same Exhibit shows gross revenues which exceed labor costs on every job. There is no proof concerning cost of materials or other costs on various jobs, and there is nothing showing any losses incurred by Delta.

In its complaint, plaintiff claims $100,000 for "damages for breach of contract." This broadly stated element of damage is not supporeted by the record. Plaintiff is not entitled to an award of general damage because, once again, it failed to introduce evidence proving the claim.

Plaintiff's post-trial brief reflects the inadequate proof of quantum in this law suit. Almost the entire brief is directed toward establishing liability and a few conclusory, unsupported remarks concerning quantum are found in the final paragraph.

Delta has had its "day in court." It clearly established that Upjohn misrepresented CPR 425 and thereby breached an express warranty; however, it has failed to prove by a preponderance of the evidence that it was damaged.

> "A plaintiff must establish his case by a clear preponderance of the evidence. *Naquin v. Marguette Casualty Company*, 244 La. 569, 153 So. 2d 395 (La. 1963); *Campbell v. Diamond M. Drilling Company, Inc.* 274 So. 2d 842 (3rd Cir. La. App. 1973). He must also prove with legal certainty every item of damages claimed. *Foggin v. General Guaranty Insurance Co.*, 207 So. 2d 176 (2nd Cir. La. App. 1967); *Fox v. American Steel Building Company, Inc.*, 299 So. 2d 364 (3rd Cir. La. App. 1974)." *Culpepper vs. Natchitoches Parish School Board*, 333 So. 2d 453 (La. App. 3rd Cir., 1976), writ denied 338 So. 2d 289 (1976).

(Emphasis added.) (The passage quoted is from a case where the same counsel for plaintiff were involved.)

We deny defendant's counterclaim, for $4,100 against plaintiff. Delta's last purchase from Upjohn totalled $4,600 of which plaintiff has paid $500. Following the adverse publicity, plaintiff no longer was able to find insulation jobs in which CPR 425 could be used; consequently, the last chemicals bought from Upjohn became useless and were discarded after they crystalized. Plaintiff is not required to pay the remaining balance on its account with Upjohn due to Upjohn's misrepresentations concerning the materials.

Plaintiff's counsel is ordered to prepare a judgment in accordance with this ruling, have it approved as to form by defendant's counsel, and submit it to us for signing within ten days.

THUS DONE AND SIGNED, in Chambers, at Shreveport, Louisiana, this 25th day of May, 1977.

BEN C. DAWKINS, JR.
UNITED STATES SENIOR DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

MONROE DIVISION

DELTA REFRIGERATION COMPANY
INC.

VERSUS CIVIL ACTION NO. 750,136

THE UPJOHN COMPANY

J U D G M E N T

IN THIS MATTER, complaint, answer thereto, counter claim and answer thereto haveing been filed; the matter having been regularly and duly fixed for trial; trial had; the law and the evidence being in accordance with the rulings on the merits signed by this Honorable Court on _____ _____, 1978:

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the plea of prescription filed on behalf of THE UPJOHN COMPANY be and same is hereby denied.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that plaintiff's demands for damages be and they are hereby dismissed with prejudice.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that defendant's counter claim be and it is hereby dismissed with prejudice.

JUDGMENT SIGNED AND FILED in Chambers at Shreveport, Louisiana on this the 7th day of June, 1977.

_____
BEN C. DAWKINS, JR., UNITED STATES SENIOR DISTRICT JUDGE

ENTERED: June 7, 1977

APPROVED AS TO FORM:

BAKER, CULPEPPER & BRUNSON
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BY: _____
R. L. DAVIS, JR.
ATTORNEYS FOR DEFENDANTS

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 77-2634
Summary Calendar*

DELTA REFRIGERATION
COMPANY, INC.

Plaintiff-Appellant,
Cross-Appellee,

versus

THE UPJOHN COMPANY

Defendant-Appellee,
Cross-Appellant

Appeals from the United States District Court
for the Western District of Louisiana

(June 13, 1978)

BEFORE RONEY, GEE and FAY, Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21.[1]

Each party is to bear its own costs on appeal.

Rule 18, 5 Cir.; See Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al., 5 Cir. 1970, 431 F.2d 409. Part I

1/See N.L.R.B v. Amalgamated Clothing Workers of America, 5 Cir., 1970, 430 F.2d 966.

ISSUED AS MANDATE: